

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JODY McCREARY §
v. § CIVIL ACTION NO. 6:07cv236
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Jody McCreary, proceeding *pro se*, filed this application for the writ of habeas corpus complaining of the legality of his confinement. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

The Magistrate Judge reviewed the petition and observed that this is the third federal habeas corpus petition which McCreary has filed regarding this same conviction. See McCreary v. Director, TDCJ-CID, civil action no. 6:06cv167 (E.D.Tex., dismissed May 15, 2006, no appeal taken), and McCreary v. Director, TDCJ-CID, civil action no. 6:07cv45 (dismissed February 28, 2007, appeal dismissed).

Consequently, the Magistrate Judge issued a Report on May 25, 2007, recommending that the petition be denied. 28 U.S.C. §2254(b)(3) provides that before a second or successive application for the writ of habeas corpus may be filed in the district court, the applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. In the present case, McCreary claimed in a cover letter that he had obtained leave from the Fifth Circuit to file a successive petition, but the letter from the Fifth Circuit which he attached to his petition simply granted him an extension of time in which to file a sufficient motion for leave

to file a successive petition. The Fifth Circuit's records show that on July 11, 2007, that Court entered an order denying McCreary leave to file a successive petition. In re: Jody McCreary, slip op. no. 07-40356 (5th Cir., July 11, 2007). The Magistrate Judge concluded that until McCreary receives permission from the Fifth Circuit to file a successive petition, the district court lacks jurisdiction to review the claims raised in such a petition filed without permission. Crone v. Cockrell, 324 F.3d 833, 838 (5th Cir. 2003). The Magistrate Judge further recommended that McCreary be denied a certificate of appealability *sua sponte*, with such denial having no effect upon McCreary's right to again seek leave to file a successive petition.

McCreary received a copy of the Magistrate Judge's Report on July 24, 2007, but filed no objections thereto; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has examined the Report of the Magistrate Judge and the pleadings in the cause, and has concluded that the Report of the Magistrate Judge is correct. It is accordingly


ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED without prejudice, with its refiling conditioned upon McCreary's receiving permission from the Fifth Circuit Court of Appeals to file a successive petition. It is further

ORDERED that the Petitioner Jody McCreary is hereby denied a certificate of appealability *sua sponte*, with such denial having no effect upon his right to again seek leave from the Fifth Circuit to file a successive petition. Finally, it is

ORDERED that any and all other motions which may be pending in this cause are hereby DENIED.

SIGNED this 27th day of August, 2007.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE